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Nationality in relation to the succession of States

Memorandum by the Secretariat

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I. Introduction

1. At its forty-ninth session, the International Law Commission adopted on first reading a draft preamble and a set of 27 draft articles on Nationality of natural persons in relation to the succession of States with commentaries thereto.[1] In accordance with articles 16 and 21 of its statute, the Commission decided to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.

2. Member States expressed their views on the draft in the Sixth Committee during the fifty-second and fifty-third sessions[2] of the General Assembly. Summaries of their observations are contained in the topical summaries of the discussion held in the Committee during those sessions.[3]

3. On 15 December 1997, the General Assembly adopted resolution 52/156, entitled "Report of the International Law Commission on the work of its forty-ninth session". In paragraph 2 of that resolution, the Assembly drew the attention of Governments to the importance for the Commission of having their views on the draft articles, and urged them to submit their comments and observations in writing by 1 October 1998. Such written comments on the draft by Governments are contained in document A/CN.4/493 and Corr.1.[4]

4. The present memorandum contains an overview of the comments and observations of Governments, made either orally in the Sixth Committee or in writing. It follows the structure of the draft articles. Where appropriate, attention is drawn to diverging opinions of the members of the International Law Commission regarding specific articles as expressed during the adoption of the draft articles on first reading.

II. General observations of States on the draft articles

A. General approach

5. States generally welcomed the speedy adoption of the draft articles on first reading. Such work was considered both timely and useful in providing solutions to the problems faced by States.[5] The draft articles were considered to be a helpful supplement to the 1978

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[1] The text of the draft articles with commentaries may be found in the report of the International Law Commission on the work of its forty-ninth session, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), chap. IV, sect. C.

[2] The following States expressed their views on the draft articles during the fifty-second and fifty-third sessions of the General Assembly: Algeria, Argentina, Bahrain, Bangladesh, Brazil, Cameroon, China, Costa Rica, Croatia, Czech Republic, Egypt, Finland (on behalf of the Nordic countries), France, Germany, Greece, Guatemala, Hungary, India, Indonesia, Israel, Italy, Japan, Libyan Arab Jamahiriya, Malawi, Mexico, Netherlands, Pakistan, Portugal, Republic of Korea, Russian Federation, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay and Venezuela.

[3] A/CN.4/483, paras. 5–60, and A/CN.4/496, paras. 128–141.

[4] As at 1 March 1999 replies had been received from the following States (on the dates indicated): Argentina (13 November 1998); Brunei Darussalam (9 October 1998); Czech Republic (14 September 1998); Finland (on behalf of the Nordic countries, namely, Denmark, Iceland, Norway, Sweden and Finland) (29 September 1998); France (30 October 1998); Greece (1 September 1998); Guatemala (11 June 1998); Italy (26 October 1998); and Switzerland (27 November 1997).

[5] A/CN.4/483, para. 5; A/CN.4/496, para. 133.

Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.[6]

6. It was recognized that the topic was a difficult one.[7] Reference was made, in particular, to diverging treaty regimes, the lack of clarity of relevant customary law, the limited jurisprudence on the subject and the variety of applicable laws.[8] It was observed, however, that the draft articles clarified a field which had in the past given rise to much controversy, both theoretical and practical, and that, although not all of the questions had been answered, their parameters and implications were now much clearer than before.[9]

7. Support was expressed for the general approach adopted by the Commission.[10] There was nevertheless the view that the draft was "interventionist", if not "dirigiste"; it was argued that States should not be placed under constraints and that sufficient flexibility should be preserved.[11] This comment was addressed in particular to the provisions relating to the right of option: it was felt that these problems should be settled by means of bilateral agreements.

8. There was also the view that the draft articles should focus more on the effects of the succession of States on the nationality of natural persons and less on the nationality of natural persons as such and that those provisions which were a matter of the general policy of States with regard to nationality or had no direct relationship with the question of the succession of States should be excluded from the draft.[12] Consequently, a title such as "Effects of the succession of States on the nationality of natural persons" or "Succession of States and nationality of natural persons" would be preferable.[13]

9. The question was raised whether the draft was to be categorized as codification of public international law or progressive development.[14] It was felt that, without putting into question the fact that attribution of nationality belonged to the realm of the internal competence of States, the draft articles established a series of basic principles on the topic, providing extensive codification of current customary international law reflecting the practice of States, doctrinal opinions and jurisprudence[15] and furnished States with guidelines for standardizing their internal rules and ensuring greater legal certainty.[16] There was also the view that, as is often the case with the drafts submitted by the Commission, the present draft articles were a combination of both existing rules of customary law and provisions aimed at developing international law. According to this view, the element of development of international law was an indispensable part of a draft purporting to cover the subject of nationality in relation to the succession of States in its entirety and to propose a legal regime more satisfactory than that which could be deduced from the already well-established principles of international law.[17]

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[6] A/CN.4/493, comments by France.

[7] Ibid., comments by France and Italy.

[8] Ibid., comments by France.

[9] Ibid., comments by Switzerland.

[10] A/CN.4/496, para. 133.

[11] A/CN.4/493, comments by France; A/CN.4/496, para. 136.

[12] A/CN.4/493, comments by Greece.

[13] A/CN.4/483, para. 59.

[14] A/CN.4/493, comments by France (on the form that the draft articles should take).

[15] Ibid., comments by Argentina.

[16] Ibid., comments by Italy.

[17] Ibid., comments by Czech Republic (on the form that the draft articles should take).

B. Human rights considerations

10. The human rights approach adopted by the Commission received widespread support.[18] Several States commended the Commission for taking into account more recent trends in international law, particularly in regard to the international protection of human rights.[19]

11. It was felt that the Commission had struck an appropriate balance between the rights and interests of both individuals and States, taking also into consideration the interests of the international community.[20] Even those who considered that when emphasizing the rights and interests of both States and individuals the Commission had moved considerably beyond the traditional approach to the law of nationality stated that they had no difficulties in following the Commission on this path, provided that the balance between the interests of States and those of individuals was maintained.[21]

12. It was also observed, however, that the Commission should not, as regards the rights of individuals, go beyond its mandate on the topic and that care should be taken to ensure that the draft articles did not impose more stringent standards on States involved in a succession.[22]

C. Form of the future instrument

13. The Commission had submitted the present draft articles in the form of a draft declaration, without prejudice to the final decision on the form the draft articles should take.[23]

14. Most States favoured a declaration as the final form to be given to the draft articles. It was stressed that, if the purpose of the future instrument was to provide the States involved in a succession with a set of legal principles and at the same time with some recommendations to be followed by their legislators when drafting nationality laws, not only might the form of a declaration adopted by the General Assembly be sufficient for the achievement of this goal, it might even have some advantages, when compared to the rather rigid form of a convention, traditionally used for the finalization of the work of the Commission.[24] It was argued that a declaration: (a) would provide a more rapid, yet authoritative, response to the need for clear guidelines on the subject, without precluding the subsequent elaboration of a convention;[25] (b) could address a broader spectrum of issues than a convention establishing strict obligations for States;[26] and (c) if adopted by consensus, might have greater authority than a convention ratified by a small number of States. It was further observed that, should the draft take the form of a treaty, States concerned that were party to it prior to the succession would be bound by the text as a whole, while new States that emerged from the succession would be bound only by provisions reflecting customary

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[18] A/CN.4/483, para. 7.

[19] A/CN.4/493, comments by Argentina and Finland (on behalf of the Nordic countries).

[20] A/CN.4/483, para. 7.

[21] A/CN.4/493, comments by the Czech Republic.

[22] A/CN.4/483, para. 7.

[23] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (3) of the commentary to the draft preamble, p. 24.

[24] A/CN.4/493, comments by the Czech Republic.

[25] Ibid., comments by Finland (on behalf of the Nordic countries).

[26] Ibid., comments by the Czech Republic.

rules, hence those contained in Part I of the draft articles, and, as a consequence, different rules would apply to the different actors involved in the same case of succession.[27]

15. On the other hand, some States expressed preference for the elaboration of a convention, which was the form taken by the previous work of the Commission on the topic of State succession.[28] It was also stressed that it would be problematic to reject the form of a treaty for a set of draft articles modifying rules of customary origin already applied by States. Should a treaty form not be chosen, one of the goals of codification — the drafting of new conventions — would not be achieved. Furthermore, in such a case the rules enunciated in the draft were nevertheless likely to have legal effects even though they were not treaty rules.[29]

16. The view was also expressed that, as it stood, the text looked more like a draft convention and that there was even a certain "legal mimicry" on the part of the draft articles with respect to the 1978 and 1983 Vienna Conventions, which increased already existing doubts as to the final status of the text.[29]

17. Other options mentioned with respect to the final form of the draft articles included a set of guidelines for national legislation or model rules.[30]

D. Structure of the draft articles

18. The structure of the draft articles elicited favourable comments.[31] The idea of splitting the draft articles into two parts, the first stating general rules and the second containing optional rules applicable to each of the four situations of succession defined in the draft articles, received widespread support.[32]

19. The view was expressed that, although Part I might not be considered in its entirety as a simple reflection of existing law — it also included recommendations — the recommendatory nature of the text was much more evident in Part II, which was mainly intended to provide guidance or inspiration to the States involved in a succession in their efforts to resolve problems of nationality. It was felt that it was only wise to assume that States concerned might, by mutual agreement — whether explicit or even implicit — decide on a different technique of application of the provisions of Part I in a particular case of succession.[33]

20. However, it was observed that, if article 19 were interpreted *a contrario*, then Part I of the draft would consist of peremptory provisions; there was thus the suggestion to review all the articles in Part I of the draft to determine whether they all actually fell into that category.[34]

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[27] A/CN.4/483, para. 57.

[28] Ibid., para. 58.

[29] A/CN.4/493, comments by France.

[30] A/CN.4/483, para. 58.

[31] Ibid., para. 6.

[32] A/CN.4/493, comments by Argentina, the Czech Republic and Switzerland.

[33] Ibid., comments by the Czech Republic.

[34] A/CN.4/483, para. 6; A/CN.4/493, comments by Switzerland.

21. It was also noted that, should the text ultimately take the form of a *treaty*, it was obvious that it would then be necessary to supplement it with provisions relating to the settlement of disputes.[35]

III. Observations relating to specific articles

Preamble

22. There were no specific comments or observations on the preamble as such.

Part I. General provisions

Article 1. Right to a nationality

23. It was considered that the right to a nationality in the context of a succession of States as embodied in article 1 constituted a fundamental rule of the draft which marked significant progress in the international protection of human rights and an improvement in the positive sense of the principle embodied in article 15 of the Universal Declaration of Human Rights.[36]

24. The Commission was further commended for going beyond the traditional approach to the right to a nationality as constituting mainly a positive formulation of the duty to avoid statelessness and not a right to any particular nationality, and having given such right a precise scope and applicability building on the fact that, in cases of State succession, the States concerned were easily identified.[37] It was also stressed that the issue here was not the right to a nationality *in abstracto*, but rather that right in the exclusive context of the succession of States. Moreover, the right to a nationality was clearly subject to the provisions of the draft articles which followed.[38] There was, however, a view that it would appear difficult — except in the case of the unification of two States — to determine, among the States concerned, which one was under the obligation that corresponded to the right proclaimed in article 1.[39]

25. It was observed that it was justifiable to consider the right to a nationality as a human right since nationality was often a prerequisite for exercising other rights, in particular the right to participate in the political and public life of a State.[40]

26. A number of States expressed satisfaction with the Commission's neutral approach to the issue of multiple nationality. But some believed that the draft articles should elaborate further on this question, as did the European Convention on Nationality.[41] There was also the view that dual or multiple nationality raised a number of difficulties and should therefore be discouraged.[42] The point was further made that while it was essential to establish the right

[35] A/CN.4/493, comments by Switzerland (General remarks).
[36] Ibid., comments by Italy.
[37] A/CN.4/483, para. 8; A/CN.4/493, comments by Finland (on behalf of the Nordic countries).
[38] A/CN.4/493, comments by the Czech Republic.
[39] Ibid., comments by Switzerland.
[40] A/CN.4/483, para. 8.
[41] Council of Europe document DIR/JUR (97)6.
[42] A/CN.4/483, para. 9; A/CN.4/493, comments by Brunei Darussalam; A/CN.4/496, para. 135.

to a nationality it was questionable whether it was necessary to establish the right to at least one nationality.[43]

27. It was also noted that since article 1 contained terms which were defined in article 2, the order of the two articles should be reversed.[44]

Article 2. Use of terms

28. Concerning the expression "succession of States", it was suggested to define it as "the replacement of one State by another in the responsibility for the administration of the territory and its population", since the draft articles involved, to a much greater extent than the two Vienna Conventions on the Succession of States on which the current definition was based, the internal legal bond between a State and individuals in its territory rather than the international relations of the State.[45]

29. As to the expression "person concerned", the Commission stressed in its commentary that the definition in subparagraph (f) was restricted to the clearly circumscribed category of persons who *had* in fact the nationality of the predecessor State. The Commission indicated that it might consider at a later stage whether it was necessary to deal, in a separate provision, with the situation of those persons who, having fulfilled the necessary substantive requirements for acquisition of such nationality, were unable to complete the procedural stages involved because of the occurrence of the succession.[46] One member of the Commission expressed reservations about the definition contained in subparagraph (f), particularly on the grounds that it was imprecise. In his view, "persons concerned" were, in accordance with international law, either all nationals of the predecessor State, if it disappeared, or, in the other cases (transfer and separation), only those who had their habitual residence in the territory affected by the succession. The successor State might of course expand the circle of such persons on the basis of its internal law, but it could not do so automatically, since the consent of those persons was necessary.[47]

30. One State referred to paragraph (6) of the commentary to this article, which contained a sentence reading "stateless persons ... resident [in the absorbed territory] are in the same position as born nationals of the predecessor State".[48] It expressed the view that, taken by itself, the sentence could be misleading and should be modified.[49]

31. The view was also expressed that it was necessary to define in article 2 the parameters of the concept of habitual residence.[50]

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[43] A/CN.4/493, comments by Greece.

[44] Ibid., comments by Guatemala.

[45] A/CN.4/483, para. 10; A/CN.4/496, para. 137.

[46] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (10) of the commentary to article 2, p. 34.

[47] Ibid., para. (12) of the commentary to article 2.

[48] Ibid., p. 32.

[49] A/CN.4/493, comments by Switzerland.

[50] A/CN.4/483, para. 10.

Article 3. Prevention of statelessness

32. The importance of this provision was highlighted by several States.[51] The view was expressed[52] that the text as well as the objective of prevention of statelessness had benefited from the deletion of the restrictive criterion of habitual residence which had been included in the corresponding principle (b) contained in the 1996 report of the Commission.[53] It was noted, moreover, that the obligation to avoid statelessness had been concretized and made operational in several other articles, such as article 6, or the savings clauses in articles 7, 8 and 18.[54]

33. The point was made that while it was certainly necessary to prevent statelessness the conferral of nationality should remain the sole prerogative of the State concerned.[55]

34. The suggestion was made, in view of the definition of "person concerned" in article 2 (f), to replace in article 3 the words "persons who, on the date of the succession of States, had the nationality of the predecessor State" by the term "persons concerned".[56]

35. Attention was drawn to paragraph (6) of the commentary to article 3, according to which the article set out an obligation of conduct, rather than one of result, in respect of the States concerned.[57] The view was expressed in this connection that given the difficulty in determining which State was bound by this obligation, article 3 might be worded in terms of an *objective* to be attained rather than in terms of an obligation of conduct, at least if the form selected for the draft articles was that of a treaty.[58]

Article 4. Presumption of nationality

36. Some States endorsed the presumption in article 4. It was remarked that the provision constituted a useful savings clause and an innovative solution to the problem of statelessness that could arise as a result of a succession of States.[59]

37. It was observed that the qualified presumption of nationality on the basis of habitual residence was a further application of the principle of the need for a genuine link between the State and the individual with respect to nationality,[60] which must not be based on formality or artifice; the criterion of habitual residence was one most frequently used in State succession to identify the initial population constituting the successor State.[61] However, there was also the view that a presumption of nationality should not be based on the sole criterion of habitual residence, but rather on the well-established principles of *jus soli* and *jus sanguinis*. It was argued in this connection that mere residence in a State was not

[51] Ibid., para. 11; A/CN.4/493, comments by Argentina, France and Italy; A/CN.4/496, para. 135.

[52] A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[53] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 86.

[54] A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[55] A/CN.4/483, para. 11.

[56] A/CN.4/493, comments by Guatemala.

[57] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), p. 36.

[58] A/CN.4/493, comments by Switzerland.

[59] A/CN.4/483, para. 12.

[60] Ibid., para. 14.

[61] A/CN.4/493, comments by Italy.

sufficient evidence of a genuine link with that State and did not necessarily entail loyalty, which was considered crucial.[62]

38. The point was made that the presumption in article 4 could be rebutted not only by other provisions of the draft articles, but also by the terms of specific agreements between States concerned.[63]

39. Certain States questioned the wisdom of including article 4, pointing out that the provision had no general application. In the case of unification of States, it was superseded by the provision in article 21 that *all* persons concerned acquired the nationality of the successor State. In the case of transfer of part of a territory, which required by definition an agreement between the States concerned, such agreement would obviously contain provisions on the nationality of persons having their habitual residence in the transferred territory, which might not necessarily be consistent with the presumption in article 4 (and when the treaty remained silent on the question of nationality, the presumption was to the contrary, i.e., in such case, the persons concerned retained their nationality).[64] In the case of the dissolution of a federal State or separation of one of its units, there was no reason to disregard the criterion of the citizenship of such a unit, recognized under the federal constitution, in favour of that of habitual residence, which was not helpful in clarifying the situation of persons living in a third State.[65]

40. It was noted that Part II of the draft articles, in which the general provisions of Part I were applied to specific categories of succession of States, was to a large extent based on the criterion of habitual residence. It was felt, however, that to suggest this criterion to the States concerned for their consideration — which was the purpose of Part II — was not the same as to formulate a presumption which would determine also the behaviour of third States.[66]

41. The view was also expressed that, while article 4 moved somewhat closer to the fundamental rule of the law of succession of States whereby, as of the date of succession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by the succession, it did not confirm this rule.[67]

42. There was still another view that the presumption of nationality established by article 4, which could function only as a provisional nationality, would place its beneficiaries in the position of having a nationality which was subject to a decision independent of the will of the person concerned. The precariousness of this attribution of nationality would inevitably extend to rights and public offices that the person concerned might obtain by virtue of the possession of that nationality. In principle, the person should be required to relinquish that office, on the date on which the authorities of the successor State determined that such person did not, in fact, have the nationality he or she enjoyed by virtue of the presumption established in article 4. This would violate the principle of acquired rights.

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[62] A/CN.4/483, para. 14; A/CN.4/493, comments by Brunei Darussalam.

[63] A/CN.4/483, para. 13; A/CN.4/496, para. 138.

[64] A recent example was pointed out in this respect: the Treaty on the State border between the Czech Republic and Slovakia, which provided, among other things, for an exchange of certain territories between the two States. No automatic change of nationality was envisaged as a result of the territorial exchange (and no provision on nationality was included in the Treaty). A/CN.4/493, comments by the Czech Republic.

[65] A/CN.4/483, para. 15; A/CN.4/493, comments by the Czech Republic.

[66] A/CN.4/493, comments by the Czech Republic.

[67] Ibid., comments by Greece.

The draft articles should therefore stipulate that persons having a presumed nationality under article 4 should not enjoy, even provisionally, rights which might be exercised only by persons who definitively had the nationality of the successor State. In this case, the presumed nationality under article 4 would be a mere fiction, since the only benefit it would provide would be the right to reside in the territory of the successor State, which persons concerned enjoyed, in any case, under article 13. Alternatively, the draft articles could provide that, if persons having the presumed nationality in question could, on the basis of that nationality, invoke acquired rights, they should be allowed to become naturalized under particularly favourable conditions; or that if such persons must be allowed to opt for the nationality of the successor State in order to continue enjoying the acquired rights exercised by virtue of the presumption after having lost the benefit of the latter, then that right of option should enable them to do so.[68]

43. The question was raised as to whether the solution proposed in article 12 of the draft did not pose the risk, in certain cases, of a number of different nationalities within a single family and whether it would not be preferable to extend the presumption of nationality of the State of habitual residence set out in article 4 to the situation envisioned in article 12, namely, that of a child without nationality.[69]

Article 5. Legislation concerning nationality and other connected issues

44. Several States expressed support for this provision.[70] Some held that the article should establish an obligation rather than merely making a recommendation, and believed that the conditional form ("should") should be replaced by the imperative ("shall").[71]

45. Several drafting suggestions were made in respect of this provision. It was thus proposed in the first sentence to replace the words "consistent with", by the words "which will give effect to". It was noted that greater precision could be achieved by rewording the end of the second sentence, so that it would read "on their status and their conditions". Furthermore, the word "consequences", in the penultimate line, was considered too vague and its replacement was therefore advocated.[72]

Article 6. Effective date

46. Support was expressed for this article.[73]

47. It was noted that, according to the provision, the attribution of nationality took effect on the date of the succession; in other words, it was usually retroactive. This retroactivity was also stipulated when the person concerned acquired a nationality by exercising a right of option, but only if, without retroactivity, the person would have been left temporarily stateless. The question was raised in this connection as to whether this latter condition should not be extended to all cases of attribution of nationality, i.e., to the whole of article 6,

[68] Ibid., comments by Guatemala.
[69] Ibid., comments by Switzerland.
[70] Ibid., comments by Argentina, Brunei Darussalam, the Czech Republic and France.
[71] Ibid., comments by Argentina and Switzerland.
[72] Ibid., comments by France.
[73] Ibid., comments by Brunei Darussalam.

instead of being limited to the case of the exercise of a right of option. The suggested amendment would have the advantage of limiting the retroactivity to the extent strictly necessary.[74]

48. According to another view, while article 6 moved somewhat closer towards the fundamental rule of the law of succession of States whereby, as of the date of succession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by the succession, it did not confirm such rule. It was noted, however, that even though the said rule had not been established in Part I, it was followed in the specific provisions of Part II (articles 20, 21, 22(a) and 24(a)).[75]

Article 7. Attribution of nationality to persons concerned having their habitual residence in another State

49. According to the view of one member of the Commission, paragraph 1 should be drafted in such a manner as to exclude any possibility that a State might attribute its nationality *ex lege*. The majority of the Commission considered that this hypothesis was covered by paragraph 2.[76]

50. Several Governments considered article 7 useful as it clearly indicated that States had certain prerogatives regarding the attribution of their nationality in relation to State succession.[77]

51. The view was expressed that the Commission had made a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned in the draft articles but that it was nevertheless essential to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States (articles 7 to 9).[78]

52. The point was made that States had a right to seek to prevent successions of States from leading to dual and multiple nationality and that article 7 reflected that aim,[79] even though the Commission claimed to be neutral on this point. However, paragraph 1 placed at a disadvantage those persons who, while having the nationality of a third State, also had "appropriate connections" other than residence with the successor State (family ties, for example). Still, to the extent that the successor State retained the *possibility* of offering its nationality to such individuals, the solution suggested in article 7, paragraph 1, would seem to be acceptable.[80]

53. While some delegations endorsed the principle in paragraph 2, others expressed reservations on the grounds that it was inconsistent with the provision in article 10, paragraph 2, and that States could thus abuse the occurrence of succession to extend their

[74] A/CN.4/483, para. 17; A/CN.4/493, comments by Switzerland.

[75] A/CN.4/493, comments by Greece.

[76] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (4) of the commentary to article 7, p. 44.

[77] A/CN.4/483, para. 18.

[78] A/CN.4/493, comments by the Czech Republic.

[79] Ibid., comments by France.

[80] Ibid., comments by Switzerland.

jurisdiction into the territory of other States by attributing their nationality to persons concerned residing in the territory of such other States.[81]

54. There was also the view that the linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions was difficult to understand.[82]

55. Drafting suggestions included the insertion of the prefix "Non-" at the beginning of the title of article 7 (immediately before the word "Attribution", (cf. the title of article 14)) and of the words "against their will" after the word "nationality" in paragraph 2, as well as the deletion of the words "against the will of the persons concerned" in the next line of that paragraph. It was further proposed to delete, at the beginning of paragraph 1, the words "Subject to the provisions of article 10" and to insert a reference to article 7 at the beginning of article 10, paragraph 1, which would thus read "Subject to the provisions of article 7, States concerned ..."[83]

Article 8. Renunciation of the nationality of another State as a condition for attribution of nationality

56. While some States considered article 8 to be of practical significance since it enunciated clearly the relevant rights and obligations of States concerned, others felt that it dealt with issues not directly connected to a succession of States which were better left to national legislation, as partly recognized by the use of non-mandatory language.[84]

57. The view was expressed that, while the commentary seemed to imply that the draft was neutral on the question of dual/multiple nationality, article 8 allowed States which had a policy of single nationality to enforce such policy.[85]

58. The need was stressed to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States (articles 7 to 9).[86]

Article 9. Loss of nationality upon the voluntary acquisition of the nationality of another State

59. As was the case with article 8, some States considered article 9 to be of practical significance, while others felt that it dealt with issues not directly connected to a succession of States.[87]

60. Referring to paragraph (5) of the commentary to article 9 stating that withdrawal of the nationality of the predecessor State cannot occur "before such persons effectively acquire the nationality" of the other State,[88] the view was expressed that this stipulation was so warranted and so essential that it should be included in the actual text of the article.[89]

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[81] A/CN.4/483, para. 18.

[82] A/CN.4/493, comments by France.

[83] Ibid., comments by Guatemala.

[84] A/CN.4/483, para. 19; A/CN.4/493, comments by Greece.

[85] A/CN.4/493, comments by Brunei Darussalam.

[86] Ibid., comments by the Czech Republic.

[87] A/CN.4/483, para. 19; A/CN.4/493, comments by Greece.

[88] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), p. 49.

[89] A/CN.4/493, comments by Switzerland.

61. As was done with respect to articles 7 and 8, it was stressed that it was essential to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States.[90]

Article 10. Respect for the will of persons concerned

62. Several States underscored the importance of article 10. The point was made that the right of option was a powerful instrument for avoiding grey areas of competing jurisdictions.[91] It was also underlined that article 10 ranged among those articles which embodied principles and rules that were intended to protect the human rights of the persons concerned and which took into consideration the current stage of development of human rights law.[92] The view was further expressed that the provision reflected a sufficiently well-established conventional and internal practice of States, especially in the cases of the formation of a new State and the cession of territory, which favoured the residents of the territory in question or persons originating therein.[93]

63. According to another view, the wording should make clear that article 10 only applied to rare cases.[94] The point was also made that, in the past, the right of option had usually been granted to a particular group of persons on the basis of an international agreement and entailed a choice *between* nationalities, while article 10 reflected the more recent practice of a choice to acquire the nationality of a State under its internal legislation, a phenomenon more adequately reflected by the phrase "free choice of nationality".[95]

64. It was observed that it was essential to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States (articles 7 to 9).[96]

65. Paragraph 1 was interpreted as meaning that, while a person concerned was to be given a choice as to which *among* the nationalities of two or more States he or she wanted, such person did not have the right to choose two or more nationalities.[97]

66. With respect to paragraph 2, some members of the Commission considered that, in the absence of objective criteria for determining the existence of an "appropriate connection", this provision introduced an undesirable element of subjectivity. They therefore believed that there was no justification for departing from the well-established notion of "genuine link". Others considered that what constituted an "appropriate connection" in a particular case was spelled out in detail in Part II and that the use of the concept of "genuine link" in a context other than diplomatic protection raised difficulties. Still other members believed that an alternative to either expression should be found.[98]

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[90] Ibid., comments by the Czech Republic.

[91] A/CN.4/483, para. 20; A/CN.4/496, para. 136.

[92] A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[93] Ibid., comments by Italy.

[94] A/CN.4/483, para. 20.

[95] Ibid., para. 21.

[96] A/CN.4/493, comments by the Czech Republic.

[97] Ibid., comments by Brunei Darussalam.

[98] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (10) of the commentary to article 10, p. 53.

67. Several States expressed support for the provision in paragraph 2. It was felt, however, that the terms "appropriate connection" needed further clarification.[99] Moreover, a number of States expressed preference for the use, instead, of the well-established phrases "genuine link" or "effective link", which were considered more objective standards.[100] It was further suggested to harmonize, for the sake of consistency, the text of draft articles 10 and 18 and to use the expression "genuine and effective link" in both.[101]

68. There was also the view that persons having effective links with the predecessor State or, where applicable, with other successor States (as was the case, in particular, of persons who, as a result of the succession of States, became minorities within the new State) must have the right to choose between the nationality of these States and that of the successor State which had taken the initiative with regard to the right of option and organized it. Instead, article 10, paragraph 2, envisaged a limited right of option which gave no other choice to persons than that of choosing the nationality of the State granting the right of option. It was felt that the above-mentioned traditional right should, however, be reflected in the draft.[102]

69. As to paragraph 3, it was superfluous, according to one view: it was unthinkable that a State could fail to attribute its nationality to a person who had exercised a right of option in favour of that nationality, since the exercise of that right and the attribution of nationality were two sides of the same coin.[103]

70. Concerning paragraph 4, it was believed that the rights of States should not be reduced excessively to the benefit of the rights of individuals and that States should retain control over the attribution of nationality. Thus, paragraph 4 was considered too restrictive[104] or too categorical; it was considered preferable to say that the State whose nationality persons entitled to the right of option had renounced might withdraw its nationality from such persons only if they would thereby not become stateless.[105]

71. As regards paragraph 5, it was felt that it required further clarification,[106] in particular with respect to the use of the expression "reasonable time limit".[107]

72. It was also considered that the linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions was difficult to understand.[108]

73. The following interrelated changes were proposed in articles 7 and 10: at the beginning of article 7, paragraph 1, the words "Subject to the provisions of article 10" should be deleted; a reference to article 7 should be inserted at the beginning of article 10, paragraph 1, which would read, "Subject to the provisions of article 7, States concerned..."[109]

[99] A/CN.4/493, comments by Brunei Darussalam.
[100] A/CN.4/483, para. 22.
[101] A/CN.4/496, para. 137.
[102] A/CN.4/493, comments by Greece.
[103] Ibid., comments by Guatemala.
[104] A/CN.4/496, para. 136.
[105] A/CN.4/493, comments by France.
[106] A/CN.4/483, para. 24.
[107] A/CN.4/496, para. 137.
[108] A/CN.4/493, comments by France.
[109] Ibid., comments by Guatemala.

Article 11. Unity of a family

74. Some members of the Commission were of the view that article 11 went beyond the scope of the present topic. Others, however, believed that it was closely connected to nationality issues in relation to the succession of States, as the problem of family unity might arise in such context on a large scale.[110]

75. Doubts were expressed by some members regarding the applicability of the principle embodied in article 11 owing to the different interpretations of the concept of "family" in various regions of the world. Others were of the view that a succession of States usually involved States from the same region sharing the same or a similar interpretation of this concept, so that the problem did not arise.[111]

76. There were also divergent views of States on the need for the inclusion of article 11. While some States were in favour of such an approach, others felt that the article raised a broader issue which was outside the scope of the topic.[112]

77. It was observed that article 11 ranged among several articles which embodied principles and rules that were intended to protect the human rights of the persons concerned and which took into consideration the current stage of development of human rights law. Agreement was voiced with the Commission' s view that acquisition of different nationalities by the members of a family should not prevent them from remaining together or being reunited.[113] While it was highly desirable to enable members of a family to acquire the same nationality upon a succession of States, a change of nationality of one of the spouses during marriage should not automatically affect the nationality of the other spouse. Reference was made also to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, according to which a change of nationality by the husband during marriage shall not automatically change the nationality of the wife.[114]

78. It was also pointed out that article 11 went beyond a common limit found in almost all international conventions and internal legislations on the matter providing for a simultaneous change of nationality of the family members at the time the family head changed his or her nationality. In most cases this solution entailed discrimination against women, whose status was thus subordinate to that of men.[115]

79. It was further observed that the article should not be interpreted as meaning that all members of a family remaining together had to have the same nationality, since that would contravene the principle of respect for the will of persons concerned; but a State could consider the unity of a family as a factor for granting nationality to certain family members under more favourable terms.[116]

80. However, the point was also made that, while the principle of family unity was an important one, habitual residence ought to be considered the most important criterion in determining nationality.[117] The remark was further made that, while the principle reflected

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[110] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (6) of the commentary to article 11, p. 56.

[111] Ibid., para. (7).

[112] A/CN.4/483, paras. 25 and 26; A/CN.4/496, para. 138.

[113] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (5) of the commentary to article 11, p. 56.

[114] A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[115] Ibid., comments by Italy.

[116] A/CN.4/483, para. 25.

[117] A/CN.4/496, para. 138.

in article 11 was sound, it might give rise to difficulties as to the definition and interpretation of the meaning of the term "family".[118]

81. There was also the view that article 11 appeared to have major implications regarding the law of residence which were not in keeping with the aim of the draft. Although there was nothing jarring about this provision in substantive terms, it really had no place in the text.[119]

Article 12. Child born after the succession of States

82. Support was expressed for the provision in article 12. It was observed that the granting of the nationality of the State concerned on whose territory a child was born under this article covered both options envisaged in the 1961 Convention on the Reduction of Statelessness, i.e. granting of nationality at birth by operation of law and granting of nationality upon application to the appropriate authority in the manner prescribed by national law.[120] It was also felt that article 12 constituted a useful development of article 24 of the International Covenant on Civil and Political Rights and of article 7 of the Convention on the Rights of the Child.[121]

83. However, it was noted that while it appeared from the commentary that the scope of the article was limited to the period directly following a succession of States, it was not clear for how much time after the succession the article was to apply.[122]

84. The question was also raised as to whether the solution proposed in article 12 of the draft did not pose the risk, in certain cases, of a number of different nationalities within a single family and whether it would not be preferable to extend the presumption of nationality of the State of habitual residence set out in article 4 to the situation envisioned in article 12.[123] Where such presumption was not applicable, the matter would be resolved in accordance with the general obligation of the State in which the child had been born to prevent statelessness in accordance with article 3.[124]

85. It was further suggested that the article should be adjusted so as to ensure that a child whose parents subsequently acquired, upon option, a nationality other than that of the State in which he or she had been born would be entitled to the parents' nationality. Attention was drawn specifically to the case where the parents subsequently acquired the nationality of a State which applied the principle of *jus sanguinis*.[125] Article 12 seemed, according to one view, to have a bias towards the principle of *jus soli*.[126]

86. A view was also expressed that the article should be deleted as it addressed a nationality issue not directly related to a succession of States.[127]

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[118] A/CN.4/493, comments by Brunei Darussalam.
[119] Ibid., comments by France.
[120] A/CN.4/483, para. 27.
[121] A/CN.4/493, comments by the Czech Republic and Italy.
[122] Ibid., comments by Brunei Darussalam.
[123] Ibid., comments by Switzerland.
[124] A/CN.4/483, para. 29.
[125] Ibid., para. 28.
[126] A/CN.4/493, comments by France.
[127] A/CN.4/483, para. 29; A/CN.4/493, comments by Greece.

Article 13. Status of habitual residents

87. When this provision was discussed in the Commission, some members believed that international law currently allowed a State concerned to require that persons who voluntarily became nationals of another State concerned transferred their habitual residence outside of its territory. Those members stressed, however, that it was important to ensure that persons concerned were provided with a reasonable time limit for such transfer of residence, as proposed by the Special Rapporteur in his third report.[128] Other members, however, felt that the requirement of transfer of residence did not take into consideration the current stage of the development of human rights law. They considered that the draft articles should prohibit the imposition by States of such a requirement. For some members, this entailed moving into the realm of *lex ferenda*.

88. Given this situation, the Commission decided not to include any provision on the matter in the draft articles, thus opting for a neutral solution. The Commission was, however, firmly of the view that a succession of States as such could not, at the end of the twentieth century, affect the status of the persons concerned as habitual residents.[129]

89. Several States endorsed article 13.[130] The principle enshrined in paragraph 1 was thus considered to constitute a useful guarantee for the respect of the rights of individuals.[131] It was observed that while a change of nationality of persons habitually resident in a third State would not affect their status as permanent residents, it might affect their rights and duties.[132]

90. The Commission was encouraged to consider whether the article should be complemented by a more specific provision on the right of residence, i.e., the right of habitual residents of the territory over which sovereignty was transferred to a successor State to remain in that State even if they had not acquired its nationality.[133] Reference was made in this context both to the Declaration on the Consequences of State Succession for the Nationality of Natural Persons, adopted by the European Commission for Democracy through Law in 1996 (Venice Commission),[134] according to which the exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein; as well as to article 20 of the European Convention on Nationality.

91. There was also the view that article 13 was clearly in the sphere of *lex ferenda* and not *lex lata*.[135] However desirable it might be to limit massive forced population transfers as much as possible, the article addressed questions which were not directly related to the Commission's mandate, as it dealt more with succession of States and the law of aliens than with nationality, and therefore did not belong in the text.[136] It was also felt that the

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[128] A/CN.4/480, draft article 10, paragraph 3.

[129] *Official Records of the General Assembly, Fifty-second Session*, Supplement No. 10 (A/52/10), paras. (4) to (6) of the commentary to article 13, pp. 60–61.

[130] A/CN.4/483, para. 30; A/CN.4/493, comments by the Czech Republic, Finland (on behalf of the Nordic countries) and Italy.

[131] A/CN.4/493, comments by the Czech Republic.

[132] A/CN.4/483, para. 30.

[133] Ibid., A/CN.493, comments by Finland (on behalf of the Nordic countries).

[134] Council of Europe document CDL-NAT (96) 7 rev.

[135] A/CN.4/493, comments by France.

[136] A/CN.4/483, para. 31; A/CN.4/493, comments by France; A/CN.4/496, para. 138.

Commission should rather have recalled the principle that State succession did not as such affect the acquired rights of natural and juridical persons.[137]

Article 14. Non-discrimination

92. Some members of the Commission regretted the fact that article 14 did not address the question of the discriminatory treatment by a successor State of its nationals depending upon whether they had its nationality prior to the succession of States or they acquired it as a result of such succession. Others believed that that was a human rights issue of a more general character and therefore outside the scope of the present draft articles.[138]

93. Several States expressed the view that the article was of the utmost importance.[139] It was noted that the provision addressed one of the most important and most difficult aspects of the protection of human rights,[140] in particular the rights of minorities, as already indicated by the Permanent Court of International Justice in connection with a dispute on the acquisition of Polish nationality.[141] It was stressed that both the American Convention on Human Rights and the International Covenant on Civil and Political Rights referred specifically to equality before the law and to the protection of ethnic, religious and linguistic minorities, thus prohibiting discrimination.[142]

94. On the one hand, there was support for the Commission's approach not to include an illustrative list of criteria on the basis of which discrimination was prohibited,[143] in order to avoid the risk of any *a contrario* interpretation.[144] On the other hand, there was the view that the current formulation was too broad, as it might, for example, prohibit any distinction, where the nationality of a successor State was being acquired, between individuals residing in the territory of that State and other persons.[145] It was therefore found preferable to spell out the grounds on which discrimination was prohibited, and the following were suggested for inclusion in such a list: race, colour, descent, national or ethnic origin, religion, political opinion, sex, social origin, language or property status.[146]

95. The view was expressed that the article should also prohibit discriminatory treatment of its nationals by a successor State depending on whether they already had its nationality prior to the succession of States or had acquired it as a result of such succession.[147] It was further felt that this provision should be expanded to provide also for complete equality between new and long-term nationals in respect of their status and rights in general.[148]

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[137] A/CN.4/483, para. 31.

[138] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (5) of the commentary to article 14, p. 63.

[139] A/CN.4/483, para. 32; A/CN.4/493, comments by Finland (on behalf of the Nordic countries); A/CN.4/496, para. 138.

[140] A/CN.4/493, comments by Italy.

[141] Advisory opinion on the question of *Acquisition of Polish Nationality, P.C.I.J. 1923, Series B*, No. 7, p. 15.

[142] A/CN.4/493, comments by Argentina.

[143] A/CN.4/483, para. 32.

[144] A/CN.4/493, comments by Italy.

[145] A/CN.4/483, para. 32; A/CN.4/493, comments by Brunei Darussalam and Switzerland.

[146] A/CN.4/483, para. 32.

[147] Ibid., para. 34.

[148] A/CN.4/493, comments by Greece.

96. It was also observed that a clear distinction should be made between a situation in which a particular requirement, such as that of a clean criminal record, would prevent a person concerned from acquiring the nationality of at least one of the successor States and would constitute discrimination prohibited by article 14, and a situation in which such requirement constituted a condition for naturalization, which was outside the scope of the draft articles.[149] Reference was made, in this connection, to the Commission's commentary to article 14 containing a footnote with an extensive reference to the requirement of a clean criminal record.[150]

97. As regards the question whether a State concerned might use certain criteria for enlarging the circle of individuals entitled to acquire its nationality, which was not addressed in article 14, the view was expressed that in such case the will of the individual must be respected.[151]

98. There was also the view that the article addressed a broader issue which was outside the scope of the topic.[152]

Article 15. Prohibition of arbitrary decisions concerning nationality issues

99. Some States drew particular attention to the importance of this article, stressing that it constituted a useful guarantee for the respect of the rights of individuals.[153] Reference was also made to article 20, paragraph 3, of the American Convention on Human Rights, stating that no one shall be arbitrarily deprived of his nationality or of the right to change it.[154]

100. It was said that often treaty provisions or national citizenship laws which were generous on paper ended up being considerably restricted in the phase of practical implementation. It was therefore important to expressly prohibit arbitrary decisions on nationality issues, as has been done in article 15, and to include procedural safeguards for the respect for the rule of law, such as the requirements in article 16.[155]

Article 16. Procedures relating to nationality issues

101. The importance of article 16 was highlighted by several States.[156] Attention was also drawn to the formulation in paragraph 3 of the Venice Declaration reading: "Any deprivation, withdrawal or refusal to confer nationality shall be subject to an effective remedy."[157] The suggestion was made to include among the procedural guarantees "reasonable fees" and also the requirement that reasons for any decision should be given

[149] A/CN.4/483, para. 33; A/CN.4/493, comments by the Czech Republic.

[150] *Official Records of the General Assembly, Fifty-second session, Supplement No. 10* (A/52/10), p. 62, footnote 98.

[151] A/CN.4/483, para. 35.

[152] Ibid., para. 36.

[153] Ibid., para. 37; A/CN.4/493, comments by the Czech Republic and Italy; A/CN.4/496, para. 138.

[154] A/CN.4/493, comments by Argentina.

[155] Ibid., comments by Brunei Darussalam and Finland (on behalf of the Nordic countries).

[156] Ibid., comments by the Czech Republic and Finland (on behalf of the Nordic countries).

[157] A/CN.4/483, para. 38.

in writing, as did the European Convention on Nationality (articles 13 and 11, respectively).[158]

102. The view was, however, expressed that article 16 was too detailed. It was suggested to amend the text so as to provide that States must "take appropriate measures to process without delay" the applications referred to in article 16.[159]

Article 17. Exchange of information, consultation and negotiation

103. The obligations set out in article 17 were considered necessary to ensure the effectiveness of the right to a nationality.[160] It was pointed out that this provision obviously should be read together with the other articles in the draft which were interrelated and gave a content to the duty to consult and negotiate. Nonetheless, it was felt that it was advisable to add a sentence stating explicitly that States concerned were also under the obligation to ensure that the outcome of the negotiations was in compliance with the principles and rules contained in the draft articles.[161]

104. The view was expressed that agreement was not an indispensable means of solving nationality problems and that legislative measures adopted by a State concerned with full knowledge of the content of the legislation of other States concerned might be sufficient to prevent detrimental effects on nationality arising from a succession of States.[162]

Article 18. Other States

105. Some members of the Commission expressed reservations with regard to article 18 as a whole, or with either of its two paragraphs. It was stated in particular that it would be difficult to apply the article in practice and that the provision would allow States to take the law into their own hands.[163]

106. Several States expressed support for the article. The view was expressed that the Commission had addressed with great clarity one of the key functions of international law in connection with nationality, i.e., to delimit the competence of States in this area. It was added that the provision was perfectly consistent with the line of legal logic followed throughout the draft articles.[164]

107. It was also held that it would be worth excluding article 18 from the draft, as it had no direct relationship with the question of the succession of States. Moreover, it concerned an extremely delicate matter — control of States in respect of a competence which was strictly linked to their sovereignty — and was liable to raise more problems than it would resolve.[165]

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[158] Ibid.; A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[159] A/CN.4/493, comments by France.

[160] A/CN.4/483, para. 39.

[161] Ibid.; A/CN.4/493, Finland, on behalf of the Nordic countries.

[162] A/CN.4/483, para. 40; A/CN.4/493, comments by the Czech Republic.

[163] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (9) of the commentary to article 18, p. 72.

[164] A/CN.4/493, comments by Italy.

[165] A/CN.4/483, para. 43; A/CN.4/493, comments by Greece.

108. It was suggested that, in view of the definition contained in article 2 (e), it might be appropriate to change the title of article 18 to "Third States".[166]

109. As regards paragraph 1, some members of the Commission argued that it dealt with a problem of a more general character which need not be addressed in the specific context of the succession of States.[167]

110. Some States felt that paragraph 1 reflected the general principle of non-opposability vis-à-vis third States of nationality granted without the existence of an effective link between the State and the person concerned. Reference was made in this respect to the Hague Convention of 1930.[168] The proviso preventing the treatment of a person having no effective link with a State concerned as a de facto stateless person was however considered to be fully justified.[169]

111. It was noted that the Commission did not in fact address the substance of the criteria for identifying the existence of an effective link, but that point was not included in its terms of reference, and in any event reliance on international jurisprudence (i.e. the *Nottebohm* case[170] and the *Flegenheimer* case[171]) could assist those called upon to deal with this issue.[172]

112. There was a view, however, that paragraph 1 overemphasized the principle of effective nationality.[173] It was felt that this provision, which appeared to authorize any State to contest the nationality granted to an individual by another State, was very questionable. It was pointed out that although in its judgment rendered in 1955 in the *Nottebohm* case the International Court of Justice had indeed emphasized that nationality should be effective and that there should be a social connection between the State and the individual, the judgment had been criticized and had remained an isolated instance. The extension of the principle of effectiveness in paragraph 1 appeared to be based on the idea that a State must take an attribution of public international law as a basis for granting its nationality, whereas the opposite applied in practice.[174]

113. It was suggested that the phrase "effective link" should be replaced either by "genuine link" used in article 5, paragraph 1, of the 1958 Geneva Convention on the High Seas and article 91, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, or by "genuine and effective link", which covered both terms used by the International Court of Justice in the *Nottebohm* case and was contained in article 18, paragraph 2 (a), of the European Convention on Nationality. It was further proposed that the terminology in articles 10 and 18, paragraph 1, should be harmonized in this respect.[175]

114. Concerning paragraph 2, certain members of the Commission were opposed to its inclusion as they considered that it gave too much prominence to the competence of other States. Some stated, however, that they could accept the paragraph if it were explicitly

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[166] A/CN.4/493, comments by Guatemala.

[167] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (9) of the commentary to article 18, p. 72.

[168] A/CN.4/493, comments by the Czech Republic and Finland (on behalf of the Nordic countries).

[169] Ibid., comments by the Czech Republic.

[170] *ICJ Reports 1955*, p. 4.

[171] United Nations, *Reports of International Arbitral Awards*, vol. XIV, p. 327.

[172] A/CN.4/493, comments by Italy.

[173] A/CN.4/496, para. 138.

[174] A/CN.4/493, comments by France.

[175] A/CN.4/483, para. 41; A/CN.4/496, para. 137.

provided that other States could treat a stateless person as a national of a particular State concerned only "for the purposes of their domestic law".[176]

115. Several States expressed their support for the provision in paragraph 2. It was observed that it constituted a remedy for the violation of the right to a nationality. It was suggested that the actual text of the paragraph should provide a clarification of the following points made in the commentary: that the provision gave third States the right to treat stateless persons as nationals of a given State, even where statelessness could not be attributed to an act of the State but where the persons concerned had by their negligence contributed to the situation; and that it was intended to redress situations resulting from discriminatory legislation or arbitrary decisions, which were prohibited by articles 14 and 15, by extending to persons referred to in the paragraph the favourable treatment granted to nationals of the State in question and protecting them from possible deportation.[177]

116. It was stressed that paragraph 2 focused exclusively on the relationship between persons who had become stateless and a third State. Drafted in the form of a saving clause, this provision preserved the delicate balance between the interests of States which could be involved in a situation of this kind.[178]

Part II. Provisions relating to specific categories of succession of States

117. As regards the typology used in Part II, it was considered more satisfactory than that of Part II of the 1978 Convention on the Succession of States and Part II of the 1983 Convention on the Succession of States. It was noted in particular that a clearer distinction was drawn between merger and absorption.[179] It was also observed that the distinction between secession and dissolution was preserved while ensuring that the provisions in both sections were similar.[180] The point was made however, that categories of succession which had been determined in theory were often difficult to identify in practice and that this might impair the effectiveness of the draft articles.[181]

118. The Commission did not include in this Part a separate section on "Newly independent States", as it believed that one of the above four sections would be applicable, *mutatis mutandis*, in any remaining case of decolonization in the future. Some members of the Commission, however, would have preferred the inclusion of such an additional section.[182]

119. Several States endorsed the above decision of the Commission not to separate cases of State succession from the specific phenomenon of decolonization, as they considered this distinction to be irrelevant in the context of the nationality of natural persons and the decolonization process to be nearly at an end.[183] It was also argued that the practice in cases

[176] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (9) of the commentary to article 18, p. 72.

[177] A/CN.4/483, para. 42; A/CN.4/493, comments by Finland (on behalf of the Nordic countries) and Switzerland.

[178] A/CN.4/493, comments by the Czech Republic.

[179] Ibid., comments by France.

[180] A/CN.4/483, para. 44; A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[181] A/CN.4/483, para. 44; A/CN.4/493, comments by Italy.

[182] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (3) of the commentary to article 19, p. 73.

[183] A/CN.4/483, para. 44; A/CN.4/493, comments by Switzerland.

of decolonization was often indistinguishable from the practice relating to other cases of succession.[184] The point was further made that decolonization could take different forms, including the achievement of independence by Non-Self-Governing Territories, the restoration of the territorial integrity of another State or the division of the territory into several States; these cases could be resolved satisfactorily by applying the principles and rules contained both in Part I or the draft articles and, to some extent, in Part II in any remaining case of decolonization in the future.[185]

120. There was also the view that, although the historical process of decolonization had, to a large extent, been completed, some colonial situations still remained, and that as those situations were addressed, cases might arise in which it would be necessary to apply rules on nationality of natural persons in relation to succession of States.[186] The point was made that the text should at least specify that the established regime applied *mutatis mutandis* to situations of decolonization.[187]

121. It was observed that Part II of the draft articles was intended to provide practical guidelines for States that were in the process of enacting their legislation or negotiating treaties on nationality issues related to a succession of States, and would indeed prove helpful in such situations.[188]

122. The view was expressed that the solutions proposed in Part II were entirely valid from the legal standpoint, for most of them reflected current international practice or constituted the logical consequence of a specific category of succession of States, as, for example, in article 22 dealing with the dissolution of a State.[189]

123. The Commission's decision to use habitual residence as the main criterion for identifying the persons to whom successor States must attribute their nationality was also endorsed. This decision was considered to be consistent with the tendency of international law to give preference to effectiveness.[190]

Article 19. Application of Part II

124. It was observed that the provisions of Part II of the draft articles were aimed at applying the general principles of Part I to different categories of successions of States but not at reflecting existing international law. Part II seemed to be intended mainly as a source of inspiration for States concerned when, for example, they entered into negotiation in order to resolve nationality issues by agreement or when they were considering the adoption of national legislation for the purpose of resolving these issues, in spite of the fact that the actual language of subsequent articles of Part II appeared fairly strong (using the verb "shall"), as if binding rules were somehow laid down. This might be actually justified even in the framework of an instrument of a declaratory nature if general principles, for the most part soundly based on customary law, were involved, as is the case for Part I of the draft articles. Such language might however prove somewhat confusing and disturbing in the

[184] A/CN.4/493, comments by Italy.

[185] A/CN.4/483, para. 44; A/CN.4/493, comments by Argentina and Finland (on behalf of the Nordic countries).

[186] A/CN.4/483, para. 44; A/CN.4/493, comments by Argentina.

[187] A/CN.4/483, para. 44; A/CN.4/496, para. 139.

[188] A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[189] Ibid., comments by Italy.

[190] Ibid.

context of Part II, and the Commission could perhaps reconsider whether article 19 was enough to dissipate any possible doubts in this respect.[191]

125. The question was raised as to the relationship, from the legal point of view, between Parts I and II of the draft. Article 19 seemed to give more weight to the provisions of Part I than to those of Part II. Article 10, paragraph 2, provided for granting the right of option only in the case of persons who would otherwise become stateless as a result of the succession, while articles 20, 23 and 26 seemed to grant a much broader right of option. In such cases where there was a difference between the provisions of Part I and those of Part II, the question was raised as to whether States should follow the general provisions or the specific provisions.[192]

126. It was further considered that the substance and the scope of article 19 were unclear and that the commentary on the article shed little or no light on its meaning or usefulness. It appeared that the purpose of the article was to establish differences between the nature and functions of the provisions of Part I and those of Part II. Such differentiation related exclusively to the degree of generality of the provisions in one part as compared to those in the other. There was no difference, therefore, in the normative nature of the provisions in the two parts: those in Part I were as binding as those in Part II. However, it was normal, with few exceptions, for the provisions in Part II i.e., those that were specific, to be in harmony with those in Part I, i.e., those that were general. Moreover, there were no apparent differences between Part I and Part II of the draft articles in respect of provisions that actually or potentially pertained to customary law or *jus cogens*, or that constituted rules of progressive development of international law. In other words, rules of any of these types were to be found in both Part I and Part II. For all the foregoing reasons, it was felt that article 19 should be deleted.[193]

127. It was also stressed that if article 19 was interpreted a *contrario*, the result was that Part I of the draft articles would consist of non-optional provisions. This suggested that the Commission considered that the provisions of Part I reflected existing customary law and, moreover, constituted peremptory rules (*jus cogens*). It would no doubt be desirable to review all the articles in Part I in order to establish whether they all did in fact have that status.[194]

128. Concerning the drafting and placement of article 19, it was suggested that the phrase "in specific situations" should be replaced by "as appropriate". The view was also expressed that the article would be better placed at the end of Part I.[195]

Section 1. Transfer of part of the territory

Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

129. It was noted that the fundamental rule of the law of succession of States whereby, as of the date of succession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual

[191] Ibid., comments by the Czech Republic.

[192] Ibid., comments by Greece.

[193] Ibid., comments by Guatemala.

[194] Ibid., comments by Switzerland (comments on the structure of the draft articles).

[195] A/CN.4/483, para. 45.

residence in the territory affected by this succession, which was missing in Part I of the draft articles, was followed in the specific provisions of Part II, including article 20.[196] It was further observed that, as far as the attribution of nationality was concerned, the rule in article 20 was widely recognized in the doctrine and was indeed a reflection of international law.[197] This rule was, moreover, justified by the fact that the successor State could not exercise sovereignty in a territory whose inhabitants remained nationals of the predecessor State.[198]

130. The point was made that the current text of article 20 could be usefully complemented by including a reference to the obligation of the predecessor State to withdraw its nationality from the persons concerned having their habitual residence in the transferred territory only after such persons acquired the nationality of the successor State. Obviously, this resulted from the State's obligation to prevent statelessness in accordance with article 3, but it was considered preferable to have an explicit clause to that effect, also in view of the fact that such explicit clause had found a place in article 25. Such addition could be drafted along the lines of article 25, paragraph 1, *in fine*.[199]

131. There was also the view that, while some of the provisions of article 20 fell within the category of codification, others, which emphasized the right of option, fell within the category of progressive development. The draft implied that an individual had the right to choose his or her nationality freely. It was felt that the rights of States with respect to nationality, as compared with those of individuals, should not be limited excessively. Unlike in the case of the approach reflected in article 20, it was essential not to end up with "forum shopping" for nationality and to avoid the "privatization" of nationality, which disregarded the public law status of nationality, a matter on which an individual was not free to decide. States had to retain control over the attribution of nationality.[200]

132. It was further argued that granting a right of option to all persons resident in the transferred territory would impose a heavy burden on the predecessor State and, moreover, could have the undesirable effect of creating in the transferred territory a large population having the nationality of the predecessor State; it was therefore suggested that the right of option to be granted by the predecessor State should be limited to persons who had retained effective links with the predecessor State,[201] as had also been proposed by one member of the Commission.[202] It was felt, moreover, that for the sake of symmetry the successor State should also be required to offer a right of option to nationals of the predecessor State who did not reside in the transferred territory, including those residing in a third State, if they had links with that territory.[203]

133. Some members of the Commission were of the view that the provisions of section 1 concerning transfer of territory and section 4 on separation should be drafted along the same lines, as they saw no reason to apply different rules in the two situations.[204] One State expressed a similar view, observing that the only two pertinent differences between transfer and separation were that (a) on transfer the successor State predated the succession, whereas

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[196] A/CN.4/493, comments by Greece.

[197] A/CN.4/483, para. 46; A/CN.4/493, comments by Argentina.

[198] A/CN.4/493, comments by Argentina.

[199] Ibid., comments by the Czech Republic.

[200] Ibid., comments by France.

[201] A/CN.4/483, para. 46; A/CN.4/493, comments by Greece and Switzerland.

[202] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (5) of the commentary to section 1, p. 76.

[203] A/CN.4/483, para. 46; A/CN.4/493, comments by Switzerland.

[204] *Official Records of the General Assembly, Fifty-second Session, Supplement No.10* (A/52/10), para. (16) of the commentary to section 4, p. 92.

on separation the successor State was born with the succession, and (b) on transfer only part of the successor State's territory was affected by the succession, whereas on separation the whole territory of the successor State was affected. It was suggested that article 20 should therefore be deleted and replaced by three new articles analogous to articles 24, 25 and 26.[205]

Section 2. Unification of States

Article 21. Attribution of the nationality of the successor State

134. Article 21 seems to have received general support. The only specific observation in respect of the article was that it embodied a mandatory rule under international law.[206]

Section 3. Dissolution of a State

Article 22. Attribution of the nationality of the successor State

135. It was noted that, while in Part I of the draft the fundamental rule of the law of succession of States whereby as of the date of succession the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by this succession could not be found, it was followed in the specific provisions of Part II, including article 22 (a).[207]

136. There was, however, also the view that article 22 gave too much prominence to the criterion of habitual residence in disregard of recent practice in Central and Eastern Europe where the primary criterion used was that of the nationality of the former units of federal States.[208]

137. Support was expressed especially for paragraph (b) of article 22.[209] There was, however, also the view that while paragraph (a) reflected an obligation derived from international law, the rule in paragraph (b) had its source in domestic law and was discretionary in nature and was therefore applicable only with the consent of the persons concerned.[210]

138. A proposal was made to merge the situations envisaged in subparagraphs (i) and (ii) of paragraph (b).[211] According to still another view, the drafting of article 22 (b) (ii) could be improved by replacing "before leaving" with "on leaving" and deleting the word "last" before "habitual residence".[212]

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[205] A/CN.4/493, comments by Guatemala.

[206] A/CN.4/483, para. 47; A/CN.4/493, comments by Greece.

[207] A/CN.4/493, comments by Greece.

[208] A/CN.4/483, para. 49; A/CN.4/493, comments by Brunei Darussalam; A/CN.4/496, para. 140.

[209] A/CN.4/483, para. 48.

[210] Ibid., para. 49.

[211] Ibid., para. 48; A/CN.4/493, comments by Switzerland.

[212] A/CN.4/493, comments by Guatemala.

Article 23. Granting of the right of option by the successor States

139. The view was expressed that article 23 was not to be read as construing the right of option as the single acceptable means of dealing with the question of the nationality of persons qualified to acquire the nationality of several successor States under the criteria of article 22. This would undoubtedly go beyond *lex lata*, and article 19, as well as article 10, paragraph 1, made it quite clear that the granting of the right of option in this case was merely suggested or proposed to States, not imposed on them. As a matter of fact, other possible alternative approaches were conceivable and did indeed exist concerning the specific issue of persons qualified to acquire the nationality of two or more successor States. These included measures such as negotiations among the States concerned with a view to determining a harmonized single superseding criterion — either the one mentioned in article 22 (a) or one taken from article 22 (b) — or even adopting a unilateral choice of a superseding criterion (obviously in such case with the proviso of granting an appropriate right of option to persons concerned who would otherwise become stateless as a result of the succession of States, in conformity with article 10, paragraph 2). Recent practice in the area of State succession had shown that a variety of such systems could work satisfactorily while being at the same time fully consistent with the fundamental protective principles set forth in Part I. Moreover, it was pointed out in this respect that the Commission, in its commentary to article 10, paragraph 1, on the will of persons concerned, stated that the "expression 'shall give consideration' implies that there is no strict obligation to grant a right of option to this category of persons concerned".[213] From a *de lege lata* perspective, it was therefore considered indisputable that international law tolerated more flexibility than article 22 together with article 23, paragraph 1, seemed to admit, and that article 19 indeed recognized that greater flexibility for applying the principles of Part I to specific situations, including the one envisaged in section 3. However, *de lege ferenda* it might be utterly desirable, with respect to persons *a priori* qualified to acquire several nationalities, to promote the right of option as the most efficient means to address the issue at hand while integrating to the fullest extent possible its human rights dimension. In view of these considerations and also bearing in mind the indicative nature of Part II as provided for in article 19, it was felt that the text of article 23 in its current wording represented a step in the right direction and a laudable attempt on the part of the Commission at progressive development of international law.[214]

140. The point was also made that it was difficult to evaluate the right of option established under article 23, paragraph 1, because it depended upon unknown factors which were exclusively a matter of the domestic law of the States concerned.[215]

141. It was suggested that paragraph 1 should be redrafted as follows: "If under article 22 the nationality of two or more successor States is attributable to persons concerned, those States shall grant a right of option to those persons."[216]

142. It was observed that paragraph 2 was too broad and therefore inconsistent with the provision in article 10, paragraph 2, which limited the categories of persons to whom a successor State had the obligation to grant the right to opt for its nationality.[217]

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[213] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (8) of the commentary to article 10, p. 52.

[214] A/CN.4/493, comments by the Czech Republic.

[215] Ibid., comments by Greece.

[216] Ibid., comments by Guatemala.

[217] A/CN.4/483, para. 50.

143. It was also stressed that the linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions was hard to understand. [218]

Section 4. Separation of part or parts of the territory

Article 24. Attribution of the nationality of the successor State

144. It was noted that while in Part I of the draft the fundamental rule of the law of succession of States whereby as of the date of succession the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by this succession could not be found, this rule was followed in the specific provisions of Part II, including article 24 (a).[219]

145. Paragraph (b) of article 24 elicited some favourable comments. The view was also expressed that, unlike paragraph (a), which reflected an obligation derived from international law, the rule in paragraph (b) had its source in domestic law and was discretionary in nature. [220]

146. The suggestion was made to merge the situations envisaged in subparagraphs (i) and (ii) of paragraph (b).[221] It was also pointed out that the meaning and scope of the phrases "appropriate legal connection" and "any other appropriate connection" were not clear.[222] It was further suggested that the drafting of article 24 (b) (ii) could be improved by replacing "before leaving" with "on leaving" and deleting the word "last" before "habitual residence".[223]

Article 25. Withdrawal of the nationality of the predecessor State

147. Reservations were expressed with respect to the issue of withdrawal of nationality as addressed in this article. Attention was drawn in this respect to the European Convention on Nationality.[224]

148. Some members of the Commission believed that paragraph 2 of article 25 was superfluous, while others considered it necessary for the purpose of defining the categories of persons to whom a right of option between the nationality of the predecessor and the successor States should be granted.[225]

149. One State also suggested that paragraph 2 should be excluded from the draft, as it concerned a matter of the general policy of States with regard to nationality and had no direct relationship with the question of the succession of States.[226]

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[218] A/CN.4/493, comments by France.

[219] Ibid., comments by Greece.

[220] A/CN.4/483, para. 51.

[221] A/CN.4/493, comments by Switzerland.

[222] Ibid., comments by Brunei Darussalam; A/CN.4/496, para. 137.

[223] Ibid., comments by Guatemala.

[224] A/CN.4/483, para. 52.

[225] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (11) of the commentary to section 4, p. 91.

[226] A/CN.4/493, comments by Greece.

150. It was again observed that the meaning and scope of the phrases "appropriate legal connection" and "any other appropriate connection" were not clear.[227]

Article 26. Granting of the right of option by the predecessor and the successor States

151. It was stated that the comments pertaining to article 23 of section 3 reflected in paragraph 139 above applied also *mutatis mutandis* to article 26 of section 4.[228]

152. The point was made that reliance on the criterion of habitual residence would be appropriate in most cases, but there could exist a group of persons who, while retaining habitual residence in the successor State, had other important links with the predecessor State, and vice versa; such situations might not be adequately addressed by granting a right of option.[229]

153. The view was also expressed that it was difficult to evaluate the right of option established under article 26, because it depended on unknown factors which were exclusively a matter of the domestic law of the States concerned.[230]

154. It was further remarked that the article was too broad, as it required the predecessor State to grant a right of option even to that part of its population which had not been affected by the succession,[231] an opinion also voiced in the Commission.[232]

Article 27. Cases of succession of States covered by the present draft articles

155. Support was expressed for a provision explicitly limiting the scope of application of the draft articles to successions of States occurring in conformity with international law, although a question was raised as to whether there could be a succession of States that would not meet such a qualification.[233]

156. There were, however, a number of reservations, both in the Commission[234] and among States,[235] as regards the inclusion of the phrase "without prejudice to the right to a nationality of persons concerned", which was considered to render the entire article ambiguous. It was pointed out that the Fourth Geneva Convention of 1949 prohibited any modification of the legal situation of persons and territories under occupation and therefore persons concerned should maintain the nationality they had before annexation or illegal occupation; the imposition by an aggressor State of its nationality on the population of a

[227] Ibid., comments by Brunei Darussalam.

[228] Ibid., comments by the Czech Republic.

[229] A/CN.4/483, para. 53.

[230] A/CN.4/493, comments by Greece.

[231] A/CN.4/483, para. 53; A/CN.4/493, comments by Greece.

[232] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (15) of the commentary to section 4, p. 92.

[233] A/CN.4/483, para. 54; A/CN.4/493 and Corr.1, comments by Argentina; A/CN.4/496, para. 141.

[234] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (3) of the commentary to article 27, p. 93.

[235] A/CN.4/483, para. 55; A/CN.4/493, comments by Finland (on behalf of the Nordic countries), Greece and Switzerland.

territory it had illegally occupied or annexed was unacceptable. Even if the Commission wished to make the right to a nationality a rule of *jus cogens*, that right could not have a place in the context of article 27, which actually envisaged the case of an international crime, a situation that allowed for no exceptions.[236] It was accordingly suggested that the phrase could perhaps be revisited by the Commission.[237]

157. A view was also expressed that the article was unnecessary in a draft dealing with certain human rights issues, as such rights should be protected regardless of whether or not a succession of States had occurred in conformity with international law.[238]

158. As this provision was included in the draft articles at a late stage of the Commission's work on the topic, the Commission left the decision on its final placement for the second reading.[239] In this respect it was suggested that article 27, which defined the scope of the draft articles, including the scope of the general provisions (articles 1–18), should be placed at the beginning of the text,[240] or in Part I.[241]

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[236] A/CN.4/493, comments by Greece.

[237] Ibid., comments by Finland (on behalf of the Nordic countries).

[238] A/CN.4/483, para. 56.

[239] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (4) of the commentary to article 27, p. 93.

[240] A/CN.4/493, comments by Switzerland.

[241] A/CN.4/493 and Corr.1, comments by Argentina.